No. 96-679

In the Supreme Court of the United States

October Term, 1996

PISCATAWAY TOWNSHIP BOARD OF EDUCATION,
PETITIONER
v.
SHARON TAXMAN

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF AMICI CURIAE OF
UNITED STATES SENATORS
TRENT LOTT, STROM THURMOND, DON NICKLES,
CONNIE MACK, LARRY E. CRAIG, PAUL COVERDELL,
MITCH McCONNELL, AND SLADE GORTON
IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI

The *Amici Curiae* are Members of the 105th Congress of the United States. As Senators in the Legislative Branch of the Federal Government, *Amici* bring a perspective to this case which neither the parties nor the other *amici* can provide. Accordingly, this brief will provide "relevant matter not already brought to" the Court's attention which "may be of considerable help" in deciding this case. All parties have consented to the filing of this brief. The letters of consent have been lodged with the Clerk of this Court.[1]

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[1] Pursuant to Rule 37.6 of the Supreme Court, *Amici* state that no part of this brief was written in whole or in part by counsel for either party and that no person or entity other than the *Amici* made a monetary contribution to the preparation or submission of this brief.

Trent Lott is a United States Senator from Mississippi and the Majority Leader. Strom Thurmond is a United States Senator from South Carolina and the President *pro tempore* of the United States Senate. Don Nickles is a United States Senator from Oklahoma and the Assistant Majority Leader. Connie Mack is a United States Senator from Florida and the Chairman of the Republican Conference. Larry E. Craig is a United States Senator from Idaho and the Chairman of the Republican Policy Committee. Paul Coverdell is a United States Senator from Georgia and the Secretary of the Republican Conference. Mitch McConnell is a United States Senator from Kentucky and the Chairman of the National Republican Senatorial Committee. Slade Gorton is a United States Senator from Washington and Counselor to the Majority Leader.

This case is of exceptional importance to the people of the United States. The Executive Branch, through the Department of Justice, has filed a brief *amicus curiae*. *Amici* Senators believe that the Judicial Branch should hear from members of the Legislative Branch, as well. It is the Legislative Branch that has sole responsibility for *making* laws and which, indeed, *made* the law that is before this Court.

The 88th Congress wrote, debated at length, and passed the Civil Rights Act of 1964. *Amici* Senators sit in the 105th Congress and do not presume to speak for the 88th Congress (which showed itself perfectly capable of speaking for itself). However, the *Amici* do propose to defend the legacy of the 88th Congress which is contained in the language of the Civil Rights Act itself.

As this case now comes before this Court, the United States is not a party. At the beginning, however, it was the United States Department of Justice that sued the Board of Education of Piscataway Township for racial discrimination. The Department of Justice has taken four different positions in this case — some of them consistent with the language and intent of the Civil Rights Act and some of them lamentably lacking that consistency.[2]

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[2] The Department of Justice filed suit against the Piscataway Board of Education on January 28, 1992. Seventeen months later (and five months after President Clinton had taken office), the Department still believed that the Board had unlawfully discriminated against Mrs. Taxman. On June 28, 1993, the Department of Justice filed a reply memorandum in which it argued that the Board's "use of a race-conscious affirmative action policy to terminate the employment of Sharon Taxman on the basis of her race was unlawful" because "it was not intended to remedy the effects of past discrimination or to eliminate any manifest racial imbalance in [the Board's] teacher workforce." The Department also argued that the Board's "use of a race-conscious affirmative action policy created an absolute bar to the selection of Sharon Taxman on the basis of her race and unnecessarily trammeled her employment interests." Mem. of Plaintiff United States in Opp. to Defendant's Motion for Summ. Judgment and in Response to Defendant's Reply Brief Opposing Plaintiff's Motion for Partial Summ. Judgment," *United States v. Bd. of Ed. of the Twnshp of Piscataway* (D. N.J.) (Civ. Action No. 92-340 (MTB)) at page i.

The United States won this case in the district court (in 1993) but then attempted to switch sides (in 1994). What the Department had once seen as unlawful racial discrimination became in 1994 acceptable race-based social engineering.[3] When the court of appeals refused to allow the Department to change sides, the Department withdrew from the case and left Mrs. Taxman to continue her fight alone. The Department took a third position in its brief on the petition for *certiorari*, and it now takes a fourth position in its *amicus* brief on the merits. That brief is, of course, styled as the "Brief for the United States," but the rightful position of the United States must be found in the text of the Civil Rights Act of 1964 and not in the Department's brief.

As Members of the Congress of the United States, *Amici* Senators have strong and abiding interests in a proper construction of the statute and in the institutional powers and prerogatives of Congress. These interests have not been represented adequately in the "Brief for the United States" or in other briefs.

In its *amicus* brief to the Third Circuit, the Department reversed itself on both points and asked that the case it had won in the district court be reversed. Brief for the United States as *Amicus Curiae*, *United States v. Bd. of Ed. of the Twnshp of Piscataway* (3rd Cir.) (Nos. 94-5090, 94-5112) at pages i, 11 *et seq*. (Sept. 1994).

In this court, the Department first argued that the "court of appeals incorrectly decided an issue of broad national significance" but that the petition for certiorari should be denied. Brief for the United States as *Amicus Curiae*, On Pet. for a Writ of Cert. to the U.S. Ct. of Apps. for the 3rd Circ., *United States v. Bd. of Ed. of the Twnshp of Piscataway* (U.S. No. 96-679) at 8 (June 1997). The Department seemed to fear that, if the petition were granted, this Court might actually decide for Mrs. Taxman ("The unusual facts of this case . . . also create a significant possibility that the Court could conclude that the layoff decision in this particular case was unjustified"). *Id*.

In its brief on the merits, the Department of Justice continues to maintain that the court of appeals erred but asks that the Third Circuit's judgment be affirmed on the grounds that Mrs. Taxman's interests were "unnecessarily trammeled." Brief for the United States as *Amicus Curiae* Supporting Affirmance at 7 (Aug. 1997). While the Department's brief on the merits has returned part way to the correct position from which it started in 1992 and 1993, the Department still cannot bring itself to file a brief "*for* the Respondent" but has filed a brief "supporting affirmance," but on narrow grounds.

[3] In an article lamenting that the "civil rights movement has turned away from its original principled campaign for equal justice under law to engage in an open contest for social and economic benefits conferred on the basis of race," Morris B. Abram, who was one of the early leaders of the civil rights movement, contrasts "social engineers" with "fair shakers." "Fair shakers" are those who, like Mr. Abram himself, believe in the "original vision of the civil rights movement," namely "equality of opportunity and a fair shake for individuals." M. Abram, "Affirmative Action: Fair Shakers and Social Engineers," 99 HARV. L. REV. 1312-13 (1986).

SUMMARY OF ARGUMENT

At the most elemental level, this case involves a controversy among Sharon Taxman and Debra Williams, two public high school teachers with equal seniority, and their employer, the Board of Education of Piscataway, New Jersey. Years ago, however, this case ceased being local and particular and began consuming enormous amounts of time and money and energy from the parties, the Federal Government, and many others with an interest in its outcome. Today, the case is on the docket of the Nation's highest court.

The dispute could have been avoided entirely if Petitioner School Board had used the simple expedient of following the law and then tossing a coin. Instead, when the Board had to choose between Mrs. Taxman and Mrs. Williams for one teaching position in the business education department of a public high school, it made its decision by looking at the color of their skin. That method of choosing among employees has been prohibited for decades.

The Civil Rights Act of 1964, which was applied to Petitioner in 1972, makes it unlawful "for an employer . . . to discharge any individual . . . because of such individual's race. . . ." This is the law that controls this case, and it is written in language that is remarkably straightforward, individualistic, and color-blind. It is language that promises equal opportunity to individuals but not proportionate shares to groups. It is law that can be understood and obeyed.

The Civil Rights Act of 1964 was enacted after one of the fiercest legislative battles in congressional history. It can fairly be said that the 1964 Act was the work of a great national "convention" on civil rights, a "convention" that was vested with all legislative powers that Article I of the Constitution vests in the Congress of the United States.

Title VII of that Act makes it an unlawful employment practice for an employer to discharge an individual because of her race. Accordingly, Title VII itself is the starting point for the controlling law in this case; it should also be the ending point.

This Court has recognized an exception to Title VII's unequivocal rule for race-based initiatives that remedy the effects of past discrimination. This case, however, contains no evidence of past discrimination and (of course) no evidence of a remedial purpose. Accordingly, the court of appeals was correct to conclude that this Court's decisions "do not open the door to additional non-remedial deviations" "from the antidiscrimination mandate of the statute." See, 91 F.3d at 1558.

The decision of the Court of Appeals should be affirmed. However, a decision for Respondent Taxman does not mean the end of "affirmative action" properly understood. Title

VII forbids race-based preferences and other race-based discrimination, but it does *not* prohibit outreach, recruitment, training, encouragement, or other nondiscriminatory programs or activities. "Affirmative action" properly understood may be one *means* by which an employer pursues the *end* of a racially diverse work force. Not all *means* may be used to obtain that *end*, however, and Title VII forbids the use of race-based preferences as a *means*.

ARGUMENT

I. The Civil Rights Act of 1964 was the culmination of a gre at national "convention" on civil rights. Title VII of that Act makes it an unlawful employment practice for a n employer to discharge an individual because of her race. Accordingly , Title VII itself is the starting point for the controlling law in this case; it should also be the ending point.

The President of the United States announced on June 14, 1997, that he wanted to "lead the American people in a great and unprecedented conversation about race." 33 *Weekly Comp. Pres. Docs*. 876, 880. *Amici* Senators welcome the President to a great (but hardly unprecedented) conversation on race which the House of Representatives[4] and the Senate[5] have

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[4] [1] *Hearings on H.R. 1909: The Civil Rights Act of 1997 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. (June 26, 1997). [2] *Hearings on the Equal Opportunity Act of 1995 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 104th Cong., 1st Sess. (Dec. 7, 1995). [3] *Hearings on the Economic and Social Impact of Race and Gender Preference Programs Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (Oct. 25, 1995). [4] *Joint Hearings on the Status and Future of Affirmative Action Before the Subcomm. on the Constitution of the House Comm. on the Judiciary and the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (Sept. 22, 1995). [5] *Hearings on Group Preferences and the Law Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 104th Cong., 1st Sess., pt. 2 (June 1, 1995). [6] *Hearings on Group Preferences and the Law Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 104th Cong., 1st Sess., pt. 1 (April 3, 1995). See also, *Hearings on the Oversight of the Civil Rights Division of the U.S. Dept. of Justice Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. (May, 20, 1997). *Hearings on the Authorization for the Civil Rights Division of the U.S. Dept. of Justice Before the Subcomm. on the Constitution of the House Comm. on the Judiciary,* 104th Cong., 1st Sess. (July 20, 1995).

[5] [1] *Hearings to Examine the Use of Racial and Ethnic Preferences in Federal Procurement Programs Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary,* 105th Cong., 1st Sess. (Sept. 30, 1997). [2] *Hearings on ISTEA's Race Based Set-Asides After* Adarand *Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary,* 105th

been conducting vigorously for more than two years.

A national conversation, however, is no substitute for national lawmaking, and some of the questions that may arise in a national conversation on race already have been answered by the people and their lawmakers. The unlawfulness of race-based layoffs is one of these questions.

That question is answered by the Civil Rights Act of 1964 which was signed into law on July 2, 1964. The 88th Congress delivered that act to the President's desk after nearly 100 days of deliberation in what might be called, not a national *conversation* about race but the great national *convention* on race. See, Andrew Kull, THE COLOR-BLIND CONSTITUTION 183 (1992). The decisions made by that "convention" are still the law of the land.

The Senate debated the bill for 83 days. *Id*. In the process, it invoked cloture on a civil rights bill for the first time, thus ending the longest "filibuster" in Senate history. Senators spoke more than 10 million words and filled up 7,000 pages of the *Congressional Record* before passing the act by a vote of 73 to 27; 82 percent of Republicans and 69 percent of Democrats voted for it. Bernard Schwartz (ed.), STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, Part II 1089 (1970) (debate); 110 CONG. REC. 14511 (June 19, 1964) (vote); 1964 CQ ALMANAC 696 (party breakdown).

When the amended act returned to the House of Representatives, it was passed by a vote of 289 to 126; 80 percent of Republicans and 63 percent of Democrats voted for it. 110 CONG. REC. 15897 (July 2, 1964) (vote); 1964 CQ ALMANAC at 636 (party breakdown).

The decisions of that bipartisan national "convention" were ratified when the act was signed by a Democratic President from Texas.

The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, has been the law of the land for one-third of a century. Subsection 703(a), which is at the heart of this case, has stood

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Cong., 1st Sess. (Sept. 19, 1997). [3] *Hearings on Proposals to Prohibit the Use of Race and Gender Preferences by the Federal Government in Employment, Contracting, and Other Policies Before the Senate Comm. on the Judiciary*, 105th Cong., 1st Sess. (June 16, 1997). [4] *Hearings on the Status of Affirmative Action Policies in California Before the Senate Comm. on the Judiciary*, 104 Cong., 2nd Sess. (Apr. 30, 1996). [5] *Hearings on the Status and Future of Affirmative Action Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary,* 104th Cong., 1st Sess. (Oct. 23, 1995). [6] *Joint Hearings on the Status and Future of Affirmative Action Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary and the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. (Sept. 22, 1995). [7] *Hearings on the Impact of the* Adarand *Case on Affirmative Action Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary,* 104th Cong., 1st Sess. (Sept. 7, 1995).

virtually unchanged since 1964, and its meaning is neither hidden nor vague. It says, in relevant part, "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race. . . ." 42 U.S.C. 2000e-2(a)(1) (1994 ed.).[6] This is the law that controls this case, and it is written in language that is remarkably straightforward, individualistic, and color-blind; language that promises equal opportunity to individuals but not proportionate shares to groups.

The law of subsection 703(a) was extended in 1972 to state and local governments and to schools. Pub. L. 92-261, §2 (state & local governments) & §3 (schools), 86 Stat. 103, amending 42 U.S.C. 2000e(a), (b) (1994) (state & local governments) & 42 U.S.C. 2000e-1(a) (1994) (schools). In the Senate report accompanying the 1972 act, the Committee on Labor and Public Welfare said:

> "The presence of discrimination in the Nation's educational institutions is no secret. Many of the most famous and best remembered civil rights cases have involved discrimination in education. This discrimination, however, is not limited to the students alone. Discriminatory practices against faculty, staff, and other employees is [sic] also common. The practices complained of parallel the same kinds of illegal actions which are encountered in other sectors of business, and include illegal hiring policies . . . and discriminatory promotion . . . techniques." S. Rept. No. 92-415, 92d Cong., 1st Sess. 11-12 (1971) (footnote omitted).

Since 1972, therefore, the Piscataway Township Board of Education, a government board that oversees the community's public schools, has been covered by Title VII. If the Board "discharge[s] any individual . . . because of such individual's race," 42 U.S.C. 2000e-2(a)(1), it violates the law. Mrs. Taxman was discharged because of her race.[7]

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[6] "It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a) (1994 ed.).

[7] Under this Court's precedents, the Petitioner has an especially difficult legal problem because its case involves a layoff. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (Title VII case) (district court order requiring that layoffs not reduce ratio of minority firefighters even if employees with more seniority had to be let go *held* to be incompatible with Title VII); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 283 (1986) (plurality opinion) (14th Amendment Equal Protection Clause case) ("layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives [which]

Amici recognize that there are persons and organizations who disagree with the Civil Rights Act of 1964 as written. They have a different vision of racial justice, or a different understanding of equality, or a different definition of discrimination, and they want their vision or understanding or definition made into law. They are a third of a century too late — and, with this case, they are in the wrong forum: They must make their appeal to Congress.

The 88th Congress passed a law that makes it unlawful to discharge an individual because of her race — and the 92nd Congress extended that law to employers such as Petitioner. The solemn decisions of those Congresses are the "supreme law of the land." U.S. CONST. Art. VI, §2.

In its brief, the Department of Justice says, "Despite the special concerns associated with the use of race in layoffs, the Court has never announced a *per se* rule against taking race into account in layoffs." Brief for the United States as *Amicus Curiae* at 14. This sentence, perhaps more than any other in that brief, sets the Department of Justice apart from *Amici* Senators.

Perhaps *this Court* has not announced a *per se* rule "against taking race into account in layoffs," *but the Congress has*, and that rule is found at 42 U.S.C. §2000e-2. The rule is simple and consistent, and it was "announced" by the one branch of the National Government that has *lawmaking* power.[8]

II. Title VII of the Civil Rights Act of 1964 prohibits racial discrimination in employment, without exception. However, this Court has construed Title VII as allowing a narrow exception for race-based initiatives that help remedy the effects of past discrimination. Additional exceptions must not be created by the courts because they would abrogate the plain meaning and stated purposes of Title VII to the detriment of the Nation's goals of equal opportunity, nondiscrimination, individual rights — and the rule

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burden is too intrusive").

[8] Additionally, under the customs by which we have agreed to govern ourselves, we trust that the decisions of popularly elected legislatures represent not just the greater number of persons but the better judgment of many minds: "What is demanded by the democratic form of government is not submission to the will of the majority because that will is numerically superior but rather submission to the reasoned judgment of the majority. We are obligated to submit to the decision of the majority, not because that decision represents a numerically superior will, but because it represents the best judgment of society with respect to a particular matter at a particular time. It is founded not upon the principle that the will of the many should prevail over the will of the few but rather upon the principle that the judgment of the many is likely to be superior to the judgment of the few. . . ." John H. Hallowell, THE MORAL FOUNDATION OF DEMOCRACY 120-21 (1954).

of law.

Title VII forbids racial discrimination in employment, but Petitioner seems to believe that it has a special dispensation to discriminate because it is in the business of educating children, which everyone agrees is an essential function of each generation. The statute does not, of course, grant such a dispensation to school boards or anyone else.

As noted earlier, the Civil Rights Act of 1964, as originally enacted, did not cover state and local governments and did not cover nonreligious educational institutions with respect to employment in connection with their educational activities. Those exemptions were intended to protect the governmental prerogatives of state and local governments and the academic freedom of educational institutions. However, both exemptions were eliminated in 1972 by the Equal Employment Opportunities Enforcement Act. Pub. L. 92-261, §2 & §3, 86 Stat. 103. By abolishing those exemptions, the 92nd Congress brought within the prohibitions of Title VII exactly the kinds of race-based actions that the Petitioner seeks to defend in this case. Sharon Taxman's case is the kind of case that the 92nd Congress meant Title VII to cover.

In extending coverage to nonreligious educational institutions, both the House committee[9] and the Senate committee[10] spoke against *discrimination*. Their foremost concern was that discrimination not be permitted in the Nation's public schools. They did not call for race-based decisionmaking in pursuit of some other goal, whether that goal be faculty diversity or something else. Indeed, the committees took the position that using race to apportion teachers' jobs sends a pernicious message to school children.

In interpreting Title VII, the lower courts looked to the statute itself and to this Court's

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[9] "The committee feels that discrimination in educational institutions is especially critical. The committee can not [sic] imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, . . . should be subject to the provisions of the Act." H. Rept. No. 92-238, 92d Cong., 1st Sess. 20 (1971).

[10] "[T]he Committee believes that the existence of discrimination in educational institutions is particularly critical. It is difficult to imagine a more sensitive area than educational institutions, where the youth of the Nation are exposed to a multitude of ideas and impressions that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination." S. Rept. No. 92-415, 92d Cong., 1st Sess. 12 (1971).

Title VII decisions.[11] Reading the straightforward, individualist, and color-blind language of the Civil Rights Act in light of judicial precedents, the Third Circuit came to two essential conclusions. First, the court of appeals correctly concluded that neither the statute nor any subsequent interpretation of the statute could excuse the kind of racial discrimination that is present in this case. "Here, there is no congressional recognition of diversity as a Title VII objective requiring accommodation." *Taxman v. Bd. of Ed. of the Twnshp of Piscataway*, 91 F.3d 1547, 1558 (3rd Cir. 1996) (en banc) (footnote omitted) [Pet. App. 29a-30a]. And second, the court of appeals correctly concluded that any change in the statute must be made by the Congress of the United States and not by courts or school boards. The Third Circuit said:

> ". . . The statute on its face provides that race cannot be a factor in employer decisions about hires, promotions, and layoffs, and the legislative history demonstrates that barring considerations of race from the workplace was Congress' primary objective. If exceptions to this bar are to be made, they must be made on the basis of what Congress has said." 91 F.3d at 1557-58. "Our dissenting colleagues would have us substitute our judgment for that expressed by Congress and extend the reach of Title VII to encompass 'means of combatting the attitudes that can lead to future patterns of discrimination.' Such a dramatic rewriting of the goals underlying Title VII does not have support in the Title VII caselaw." *Id*. at 1558, n. 9.

It hardly need be said — although this case proves how important it is to restate the principles regularly — that the Third Circuit's reading of Title VII is in harmony with both the structure of the Constitution and its guarantee of the equal protection of the laws. Two years ago, this Court said:

> "[T]he Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection. . . . 'A free people whose institutions are founded upon the doctrine of equality' should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. . . ." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (citation omitted)[12] (5th Amendment Due Process Clause-equal protection component

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[11] Primarily, *Johnson v. Transportation Agency, Santa Clara Co., Calif.*, 480 U.S. 616 (1987), and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

[12] The citation is to *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("distinctions between citizens solely because of their ancestry are by their nature odious to a free people whose institutions are founded upon the doctrine of equality"). As the *Adarand* Court noted, 515 U.S. at 214, it is possible to quote such stirring language and still come to the "most unfortunate results." It was in *Hirabayashi* that the Court upheld a curfew which was applicable only to

case).

III. Title VII forbids racial discrimination and race-based preferences, but it does not forbid "affirmative action" properly understood. "Affirmative action" that does not use racial preferences is permissible under Title VII and compatible with it.

Title VII forbids discrimination in employment against individuals because of their "race, color, religion, sex, or national origin." Title VII forbids race-based preferences, but it does not forbid "affirmative action" properly understood.[13]

If "affirmative action" means *only* (1) eliminating workplace conditions that pose arbitrary barriers to minorities and women, (2) reaching out and bringing more minorities and women into the pool of qualified applicants, and (3) adopting similar race-neutral programs and practices, *and not* using race-based preferences, then Title VII imposes no legal barrier to "affirmative action."

"Affirmative action" properly understood can include outreach, recruitment, training, encouragement, and so on, but must never include race-based preferences.[14] "Affirmative action"

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persons of Japanese ancestry.

[13] Of course, the term "affirmative action" has no fixed meaning, and it is common today for experts to distinguish different kinds of "affirmative action." See, *e.g.*, Testimony of Susan Au Allen to the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (Oct. 23, 1995) (distinguishing "equal opportunity" affirmative action from "preferential treatment" affirmative action); Testimony of Linda Chavez to the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (Sept. 7, 1995) (distinguishing "equal opportunity" affirmative action from "equal results" affirmative action); and Glenn C. Loury, "How to Mend Affirmative Action," 127 *The Public Interest* 33, 41 (Spring 1997) (distinguishing "developmental" affirmative action from "preferential" affirmative action). See also, Testimony of Carl Cohen to the Subcomm. on the Constitution of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (Dec. 7, 1995) ("affirmative action" once meant the "elimination of racially discriminatory practices" but now often means "preferential devices designed to bring about redistribution of the good things of life to match ethnic proportions in the population").

[14] "The Civil Rights Act of 1997," a bill introduced in this Congress, provides an example of how "affirmative action" properly understood is compatible with the principle of nondiscrimination. The bill prohibits discrimination and preferences based on race, color,

properly understood may be one *means* that an employer uses to obtain the *end* of a racially diverse work force. Not all *means* may be used to obtain that *end*, however, and Title VII forbids the use of race-based preferences as a *means*.

Ironically, this very case demonstrates that race-neutral *means* can lead to racially diverse *ends*. To the School Board's credit, there was no history of discrimination by the Board and no charge of race-based discrimination had ever been filed against the Board with any State or Federal agency prior to adoption of its "affirmative action" program. "[T]here is not even a suggestion" in the record of this case that "the Board had ever intentionally discriminated against any employee or applicant for employment on the basis of race." *United States v. Bd. of Ed. of the Twnshp of Piscataway*, 832 F.Supp. at 838 (D.N.J. 1993) [Pet. App. 94a]. Yet, at "all relevant times, Black teachers were neither 'underrepresented' nor 'underutilized' in the Piscataway School District work force. Indeed, statistics in 1976 and 1985 showed that the percentage of Black employees in the job category which included teachers exceeded the percentage of Blacks in the available work force." *Taxman v. Bd. of Ed. of the Twnshp of Piscataway*, 91 F.3d at 1550-51 (footnote omitted) [Pet. App. 11a-12a].

The 88th Congress enacted the Civil Rights Act of 1964 to protect individuals against discrimination on the job. Petitioner School Board has demonstrated over the years just how well that law can work within its community of teachers and others. By affirming the judgment of the court below, this Court can demonstrate just how well that law will work to protect the right of one lone individual whose employer (and government) discriminated against her on the basis of her race. Title VII was made to protect Mrs. Taxman and Mrs. Williams and every other individual, of whatever race, who finds herself discriminated against at work because of the color of her skin.

CONCLUSION

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national origin, or sex in the programs and activities of the Federal Government, and it specifically allows the use of "affirmative action" properly understood. Section 4 of the Senate bill is titled "Affirmative Action Permitted" and reads in part: "This Act does not prohibit or limit any effort by the Federal Government or any officer, employee, or agent of the Federal Government to encourage businesses owned by women and minorities to bid for Federal contracts or sub-contracts, to recruit qualified women and minorities into an applicant pool for Federal employment, or to encourage participation by qualified women and minorities in any other federally conducted program or activity, if such recruitment or encouragement does not involve granting a preference, based in whole or in part on race, color, national origin, or sex, in selecting any person for the relevant employment, contract or subcontract, benefit, opportunity, or program[.]" S. 950, §4, 105th Cong. 1st Sess. (introduced June 23, 1997) (§4 of the Senate bill is identical to H.R. 1909, §3).

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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